

A RECONSIDERATION OF THE HEARSAY RULE AND ADMISSIONS*

JOHN S. STRAHORN, JR.†

Dying declarations

The dying declarations of the victim, if made in fear of death and concerning the circumstances of the assault, may be offered in a criminal homicide case. They may be used either for or against the defendant, for narrative purposes, and to prove the truth of their content. The same "necessity" underlies this and the following hearsay rule exception, i. e., the unavailability of the declarant himself as a witness and an extraordinary need for having the advantage of his testimonial knowledge lest injustice be done. It is for this exception that the "circumstantial guarantee" can most easily be rationalized in terms of a positive stimulus to trustworthiness equivalent to the conditioning devices, although, to be sure, a complete justification for the exception can also be worked out on the basis of intrinsic superiority. The expectation of death, the imminence of divine judgment on one's conduct, the gravity of the situation, all do create a situation working a positive stimulus to trustworthiness were it ever desirable to look for one in the hearsay exception situations.

But the dying declaration also has a peculiar intrinsic superiority as testimony in its own right. It is highly probable that the victim did perceive that which he narrates. The typical conduct of the assailant thus narrated is of such simple outline that mistakes in perception of the normal sort are less than usually likely. Recollection will usually be but for a brief interval, never more than one year and one day.³³ Despite the lapse of time, the vividness of the experience will make it one not likely to be easily forgotten. Narration is capable of being made in simple and unmistakeable terms, in view of the type of event to be narrated. Motive to falsify is seen to be absent by the factors mentioned above as furnishing the alternative positive stimulus to trustworthiness. Further, the dying declaration is intrinsically superior with reference to the danger of error in its being reproduced in the courtroom. The statements and conduct of a dying man are likely to be

* The first installment of this article, containing footnotes 1 to 32, appeared in the March issue of the REVIEW. (1937) 85 U. OF PA. L. REV. 484.

† A. B., 1922, St. John's College; LL. B., 1925, Washington and Lee University; S. J. D., 1926, Harvard University; J. S. D., 1931, Yale University; Professor of Law, University of Maryland School of Law; author of *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962; *Criminology and the Law of Guilt* (1936) 84 U. OF PA. L. REV. 491, 600, and other articles in legal periodicals.

33. Because of the rule of criminal law that a conviction of criminal homicide may be had only if the victim dies within one year and one day of the infliction of the fatal wound.

well attended to and thus well perceived. The vivid nature of their utterance makes for intent to remember and probable memorandum to aid recollection. Narration is hardly a problem inasmuch as, again, it is a matter of the quotation of small groups of words, with no range of choice for the witness in describing his experience.

It seems to the writer that the rule restricting the use of dying declarations to criminal homicide cases concerning the death of the victim, with one exception, tends to prove that the true rationale of the exception is its intrinsic superiority and not a matter of its having a positive stimulus to trustworthiness. Were the superiority of the dying declaration due to the positive effect of fear of death as a stimulus to trustworthiness it would be appropriate to use dying declarations, actually made in such fear, in any case, civil or criminal, and about any subject matter. There would be present a "necessity" found in the death of the narrator and a circumstantial guarantee found in his fear of death when he spoke. But the rule limits them to criminal homicide cases brought because of the death. This rule recognizes that the superiority of the dying declaration exists only where it is as to a certain type of fact, viz., a fatal assault on the victim, which is something peculiarly likely to be well perceived, briefly and accurately remembered, and simply narrated, without motive to falsify. The law does not recognize any greater trustworthiness of dying declarations as to the normal run of facts for which there is likely to be the normal chance of erroneous perception, long time or casual recollection, and language trouble in the narration. Thus it must be argued that the important factor in the dying declaration, as the law works it out, is not the positive stimulus of the fear of death,³⁴ but rather the intrinsic superiority of the *specific type* of dying declaration which the rule permits.

To be sure, the law even rejects the use of dying declarations in one class of cases, civil suits for wrongful death, where there is present the same intrinsic superiority. But is not this to be explained by the historical accident of the fact that at the time the rule was crystallizing, before the enactment of Lord Campbell's Act,³⁵ there were no civil suits for wrongful death? Did not the framers of the rule merely visualize what was then the only possible situation in which the intrinsic superiority of the dying declaration could be availed of?

On such a basis the writer is prone to feel that a much cited minority case,³⁶ departing from the strict common law limitation and admitting dying declarations in all cases, civil or criminal, wrongful death or otherwise, is

34. Although, to be sure, the rule as it is worded requires that the declarant actually fear death at the time he speaks.

35. 9 & 10 VICT. c. 93 (1846).

36. *Thurston v. Fritz*, 91 Kans. 468, 138 Pac. 625 (1914).

wrong and should not be followed. He feels that immediate reform of the dying declaration rule should be limited to extending it to civil actions for wrongful death, but that, short of adopting the broad departure of the Massachusetts Hearsay Statute³⁷ for all statements by deceased persons, there is no justification for permitting dying declarations as to all and sundry facts. To do this would depart from the true spirit of the common law rule for dying declarations, which is to admit only those which happen to possess an unusual intrinsic superiority following from the nature of the typical facts included therein.

The common law rule itself recognizes this principle of intrinsic superiority in its own limitation of dying declarations to the "res gestae" of the killing. Thus the rule is to restrict their content to the very circumstances of the killing, likely to be well perceived, remembered, and narrated, and not to permit them, even in criminal homicide cases, to narrate other relevant facts antedating the assault. For these latter facts there is normal likelihood of defective perception, loss of memory, and inept choice of words in the narration.

Declarations against interest

Statements made by a person now unavailable as a witness which are damaging to his own pecuniary or proprietary interests may be offered as narration to prove the truth of their content. The necessity is obvious from the statement of the rule and is the same as for dying declarations. No possible positive stimulus to trustworthiness can be discerned to supply the circumstantial guarantee, which must, therefore, be rationalized in terms of the intrinsic superiority of the type of utterance which is permitted by the exception.

This intrinsic superiority would also seem obvious. There is hardly a happier situation for accurate perception of the subject of a narration than that held by the speaker concerning *his own* money or property affairs. While time may have elapsed between the fact and the narration about it, yet the same consideration as for perception suggests that one will vividly remember any of his own money or property affairs about which he essays currently to speak. The nature of the two topics is such as to indicate little possibility of inept phraseology leading to inaccurate acquisition of meaning by the fact finder. Money has either been paid or it has not, property has either been sold or it has not. For such topics there is little chance of that awkward choice of wording which causes untrustworthiness at the narration stage. The rule that the statement must be *against* the speaker's interest restricts the exception to situations where the usual motive to falsify is likely

37. 2 MASS. GEN. LAWS (1932) c. 233, §§ 65, 65A.

to be totally absent. One does not consciously make false unfavorable statements.

The limitation of declarations against interest to money and property affairs and the rejection of declarations against penal interest, i. e., those admitting guilt of a crime, is usually considered irrational and unjust. It is, no doubt, a historical accident.³⁸ Certainly one's having committed a crime is a matter as likely to have been well perceived, accurately remembered, and simply narrated as the details of one's money or property affairs. But perhaps there is more motive to falsify, particularly in the so-called "deathbed confessions" whereby one, actually innocent, may be able to do a good turn for a guilty friend by making a false exculpatory statement. The writer is not convinced that the deathbed statement against the penal interest of the speaker is as intrinsically trustworthy as the usual declarations against pecuniary and proprietary interest.

The miscellaneous hearsay exceptions

There remain several minor hearsay exceptions, not worthy of separate treatment in their own right, for which the necessity is obvious, i. e., the unavailability of the declarant. In all of them there is little, if any, positive stimulus to trustworthiness existent at the time of the narration. The circumstantial guarantee must be found in terms of the intrinsic superiority of the respective utterances. In all of them the motive to falsify is absent as the rules are stated.

Thus one's statement about pedigree facts concerning his own family is thought trustworthy. Facts of birth, death, marriage, relationship are of a sort not usually capable of mistaken perception. Recollection is no problem, because, though much time may have elapsed, constant family discussion of such facts tends to offset the likelihood of forgetting. Such facts are by their nature simple to narrate.

The attestation of a witness is acceptable as narration of the fact of the execution of the document by the signer. Whether an attestation clause is written in full or not, the attester's signature is taken as the equivalent of his narrative statement that the signer did execute the instrument in an acceptable manner. An attesting witness is one very likely to have accurately perceived the execution of the instrument. The interval for his recollection is but brief. The type of narration is such that there is little danger of garbled testimony. An attestor's narrative of execution possesses intrinsic superiority and need not be conditioned.

In the area where reputation is permitted to be used (veracity, land boundaries, marriage) it is, in substance, the proof of the hearsay state-

38. See Morgan, *The Rationale of Vicarious Admissions* (1929) 42 HARV. L. REV. 461, 479.

ments of many people to the same effect. Where any one such hearsay statement would be suspect as involving the normal risk of the untrustworthiness of non-conditioned narration, the fact of agreement between so many contemporaneous statements of the same fact indicates that all must be true. For this reason reputation evidence has intrinsic superiority because of its being hearsay corroborated by much other hearsay to the same end.

The exceptions for land boundaries and deed-recitals are based on the serious nature of the statements and on the idea that land titles have to be founded on the use of such statements. In the case of affidavits, testimony not trustworthy enough to be heard by a fact finder on a normally contested issue is thought superior enough for use on incidental or preliminary issues. The exceptions for learned treatises and commercial lists are too little developed to merit much treatment, but the intrinsic superiority of such narration should be obvious.

*Reform of the hearsay exceptions*³⁹

Contention for reform of the hearsay exceptions generally has taken two directions. One is in favor of the enactment of the Massachusetts Hearsay Statute.⁴⁰ This would permit the use of any statement of a deceased person, if made in good faith, before litigation arose, and upon his personal knowledge. This goes much farther than did any of the common law hearsay exceptions, for it would admit evidence possessing far less intrinsic superiority than the most lax of the regular exceptions.

The other is the contention for a separate exception to admit all statements of testators in a will contest case concerning the execution of the will. While many such statements come in already under recognized principles for circumstantial utterances and for statements of mental condition, it is felt⁴¹ that there should be a broad general exception for all statements by testators which would make unnecessary the drawing of the technical distinctions required by the present calendar of departures from the hearsay rule. The writer feels that there is more justification for such an exception than for the Massachusetts Hearsay Statute, inasmuch as statements by testators about the execution of wills do possess an unusual intrinsic superiority. There would be high likelihood of accurate perception, vivid recollection, and simple narration for facts known to the testator which are relevant in a will

39. Particularly on reform of the hearsay exceptions see MORGAN ET AL., *THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM* (1927) 51, 63. This work, a research undertaken under the auspices of the Commonwealth Fund, dealt both with the Model Statute for Business Transactions and the Massachusetts Hearsay Statute.

40. See *supra* note 37.

41. 3 WIGMORE, *EVIDENCE* (2d ed. 1923) § 1738.

contest. This is more than can be said for the Massachusetts statute, which admits narration as to facts for which the dangers of inaccurate perception, recollection, and narration are normal.

The writer feels that any reform of the hearsay exceptions should be made with reference to the common denominator of all of them. This is the recognition of typical situations wherein the dangers of inaccurate perception, recollection, and narration, and likelihood of motive to falsify, are unusually absent. Thus the conditioning devices which are imposed to avoid the normal dangers along these lines may be safely dispensed with.

Does it not lead to more accurate thought about the hearsay exceptions to accept such a theory as the rationale of the trustworthiness of that which is permitted to be shown? Emphasizing the circumstantial guarantee as being a positive stimulus to trustworthiness causes the true nature of the hearsay exceptions to be misunderstood. Few of the exceptions actually present any positive stimulus, and those which present a vestige of one are better understood in terms of intrinsic superiority.

ADMISSIONS ⁴²

Admissions are of four kinds: (1) express admissions, which are the unfavorable statements of one himself a party to the case; (2) vicarious admissions, which are statements by another than a party and which are usable against the party because of the relation between him and the speaker; (3) tacit admissions, which are statements by one other than a party and which are usable against the party because they were spoken in his presence or addressed to him under circumstances making it natural for him to dissent; and, (4) implied admissions, wherein certain conduct of a party is admissible against him because it amounts circumstantially to an expression by him of the weakness of his cause.

The problem now is the relation of admissions to the hearsay rule. The writer believes that while some instances of all these types of admis-

42. In the ensuing treatment of admissions the writer plans to confine his citation of other discussions of admissions and their relation to the hearsay rule to material published since Professor Morgan first advanced the genuine exception theory in 1921. Morgan, *Admissions as an Exception to the Hearsay Rule* (1921) 30 YALE L. J. 355. There has been sufficient disagreement since that date among the various writers, most of whom have had some occasion to make reference to Professor Morgan's views. To attempt to incorporate the divergent views that existed before Professor Morgan's article was published would merely add to the discord which must readily be apparent from the present writer's ensuing pages. Suffice it to say that the various writers before Professor Morgan adhered to some one of the various conflicting views which are at least mentioned herein. There was great difference in terminology, even among those adhering to what was substantially the same theory. After a survey of the material published before 1921, particularly of the English and American treatises on evidence, with a view to collating the theories of admissions, the present writer concluded that the readability of this article would be improved by abstention from documenting it with quotations from or citations to the works of the ante-Morgan era. Professor Morgan's article itself contains an excellent survey of the previous literature of the subject.

sions may have narrative value, yet the true rationale of all types of admissions is not any narrative theory of them but one of hearsay rule inapplicable, i. e., that they are used as conduct. It is the present thesis that admissions are usable because they are the relevant conduct of a party or of one having a relevant relation to a party, and that therefore they can be rationalized without reference to their trustworthiness even if they might possess narrative value also. The writer feels that express admissions and tacit admissions are to be explained as utterances which are themselves relevant circumstantial conduct, that vicarious admissions are partially to be explained as such and partially as utterances which are part of relevant conduct, and that implied admissions are to be explained as simply being relevant non-verbal or non-narrative conduct in their own right.

It is planned to divide the discussion of the relation between admissions and the hearsay rule according to the four types set out above. Minor differences in treatment are indicated by the differences in the four types of admissions even though all fall ultimately into the general category of hearsay rule inapplicable to conduct. At appropriate places in the treatment it is planned to discuss the opposing theories of admissions. These mainly have dealt with express admissions. Thus the discussion under that heading will be the most extensive.

A factor which emphasizes the desirability of a *single* theoretical explanation of the relation between all types of admissions and the hearsay rule is the ease with which one of these types shades off into another. It is frequently hard to draw sharp lines of distinction between neighboring types of admissions. Thus the outright express type of admission wherein the party himself speaks blends easily into the express authorization of another to speak for him, which is sometimes hard to distinguish from the vicarious admission, i. e., a statement by another not authorized or ratified but incidental to an existent relation between speaker and party. The subsequent ratification or express adoption of the statement of another, technically an express admission, is very similar both to the vicarious admission and to the tacit admission, where the statement of another is impliedly adopted by silence. Then too, in the latter situation, the conduct of not dissenting from the adverse statement of another closely approaches the "implied admission" from other unfavorable and non-verbal or non-narrative conduct. The vicarious admission and the tacit admission both revolve around a relation between the speaker and the party, in the one case that of the pre-existent one working the privity, in the other that of speaker and addressee of the accusatory statement. This difficulty of classification makes a single rationale all important.

Express admissions

Express admissions are those extra-judicial⁴³ statements of one who is actually a party to the case which are offered against him by his opponent. The present writer prefers the view that they may be used despite the hearsay rule because that rule is inapplicable to them, inasmuch as they are offered as the relevant conduct of the speaker and not as narrative alone. Specifically, they fall under that sub-heading of hearsay rule inapplicable which admits utterances which are themselves relevant circumstantial conduct.

Despite some earlier wavering on the subject of the relation between the hearsay rule and admissions, Dean Wigmore currently seems to hold to this circumstantial utterance or relevant conduct theory of admissions. In the first edition of his treatise⁴⁴ Dean Wigmore advanced the theory that the rationale of admissions was that they impeached⁴⁵ the case of the party against whom they were offered. He argued that by analogy to prior inconsistent statements which impeach the credibility of witnesses, the prior statements of a party, inconsistent with his present stand as indicated by his pleadings, should be considered. In the second edition,⁴⁶ admittedly then under the influence of the first of Professor Morgan's two articles⁴⁷ on admis-

43. Extra-judicial admissions, which are the subject matter herein, must be distinguished from judicial admissions, as to which there is no problem under the hearsay rule. Judicial admissions are agreed statements of facts or stipulations formally entered into by parties as an incident of litigation. They partake of the nature of pleadings in that they delimit the area within which evidence may be offered. Extra-judicial admissions, on the other hand, are merely bits of evidence to be offered to establish the propositions delimited by the pleadings. For that matter, that which is a judicial admission in the case in which it is entered may in a separate case also serve as an extra-judicial admission, if it meets the requirements therefor. A now obsolete theory of admissions, which confused judicial and extra-judicial ones, was that admissions came into the case as a "substitute for proof". Professor Morgan has ably disposed of this theory. See Morgan, *supra* note 42, at 366.

44. 2 WIGMORE, EVIDENCE (1st ed. 1904) § 1048.

45. See, as dealing with the "impeachment" theory, Maguire and Vincent, *Admissions Implied from Spoliation or Related Conduct* (1935) 45 YALE L. J. 226, 230.

46. 2 WIGMORE, *op. cit. supra* note 41, § 1048. Professor Gifford devoted almost half of a seven page review of this edition of Dean Wigmore's treatise to a discussion of the treatment of admissions therein. Gifford, Book Review (1924) 24 COL. L. REV. 440, 442-444. Professor Gifford apparently disagreed both with Dean Wigmore and Professor Morgan, and himself held to the "substitute for proof" theory, citing as supporting that theory Mascardus, Thayer, Greenleaf, and Chamberlayne. Professor Gifford seemingly considered that Dean Wigmore was, in his second edition, completely agreeing with Professor Morgan that admissions were used under a *genuine exception* to the hearsay rule. As noted in the text above, the present writer does not thus interpret Dean Wigmore's stand in his second edition. Professor Gifford aptly disposed of Dean Wigmore's then theory that admissions satisfied the rule of cross-examination because the admitter could explain them away under cross-examination by pointing out that admissions had been used long before parties were competent witnesses. See also, reviewing Dean Wigmore's second edition, and discussing the admissions controversy, Kidd, Book Review (1924) 12 CALIF. L. REV. 250, 251. See also, Kidd, *Some Recent Cases in Evidence* (1925) 13 CALIF. L. REV. 285, 384, 387.

47. Morgan, *supra* note 42. An interesting, and the first, commentary on this article of Professor Morgan's is found in Chafee, *The Progress of the Law, 1919-1922, Evidence* (1922) 35 HARV. L. REV. 428-429. Professor Chafee contrasts the difference between the Morgan view and that of Dean Wigmore in his (then current) first edition as one taken in terms of whether admissions have substantive weight in the case. He considers Professor Morgan's view to call for giving admissions substantive weight while Dean Wigmore's original impeachment theory would deny them that. It is interesting to note that Professor Chafee classified

sions, he changed his viewpoint to one of hearsay rule satisfied. He apparently then agreed with Professor Morgan that admissions were used in a narrative way, but seemingly would not go so far with him as to concede a genuine exception to the hearsay rule for them. In his still more recent publications Dean Wigmore apparently has abandoned the view held in this second edition in order to swing again to a modified⁴⁸ version of the impeachment theory of admissions, because he now specifically states that admissions are a species of circumstantial utterances.⁴⁹

The present writer feels that the circumstantial utterance theory of admissions furnishes the simplest explanation of their relation to the hearsay rule. We have seen that the rule is inapplicable to circumstantial utterances generally because they are utterances which are themselves relevant conduct, in that they throw some light either on the separate conduct of the speaker or on the conduct of some one who has heard the utterance. The express admission is in the former class. The fact of the utterance by the party and his opponent's desire to use it throw some light on the separate and non-contemporaneous conduct of the party-speaker, viz., his conduct of the affair on which the instant case hinges. The justification for using

the problem under "Preliminary Topics", a heading which included admissions in the first two editions of Thayer's *CASES ON EVIDENCE*. This classification of admissions by Thayer reflected his adoption of the now obsolete "substitute for proof" theory. Professor Chafee had this to say about Professor Morgan's genuine exception view: "On the other hand, this one-sided aspect makes admissions so different from all the recognized hearsay exceptions, that it is questionable whether they have any place there." Chafee, *supra*, at 429.

48. The use of the word "modified" is meant to imply that Dean Wigmore's latest stand is not the same as that in the first edition of his treatise. As the ensuing footnote points out, this latest theory seems to be that admissions are circumstantial utterances which do impeach the case of the party against whom they are offered. This would seem to constitute an adherence to the circumstantial utterance theory under the name of the "impeachment" theory. The problem would seem to revolve around whether admissions are to be accorded substantive weight in the case. Both from the terminology quoted below concerning admissions and from his analogous stand for substantive weight for prior inconsistent statements admitted by the witness, discussed *supra* note 7, 85 U. OF PA. L. REV. at 489, we must take it that Dean Wigmore, today, stands for giving admissions substantive weight in the case. On the other hand, Professor Morgan, writing at a time when the only one of Dean Wigmore's views yet announced was the "impeachment" one of the first edition, interpreted it both as being different from the circumstantial utterance theory and as denying admissions positive weight in the case. Morgan, *supra* note 42, at 356, 357. It is in reliance on Professor Morgan's interpretation of Dean Wigmore's original impeachment theory that the present writer concludes that his latest announced version of it is not the same as that of 1904.

49. WIGMORE, *CODE OF THE RULES OF EVIDENCE* (2d ed. 1935) 201: "A party's admission is receivable on the same principle as a witness' inconsistent statement offered to impeach his testimony. . . . A party's evidential admission, not being governed by the hearsay rule, need not satisfy any of the exceptions to that rule. . . ." *Id.* at 332-333: "Utterances used as Circumstantial Evidence. Where an utterance is relevant and admissible as circumstantial evidence for some purpose, . . . in particular . . . a statement used . . . to impeach a party by way of admissions or confessions." WIGMORE, *STUDENT'S TEXTBOOK ON EVIDENCE* (1935) 197: "An admission is for a party-opponent what a self-contradiction is to the witness—a statement made somewhere else, and inconsistent with his allegations of claim or defense in the case on trial. . . ." *Id.* at 199: "Admissions are not an exception to the hearsay rule; that rule does not apply to them any more than to a witness' self-contradictions, because the reason for the rule here ceases." *Id.* at 276: "Utterances may be admissible as circumstantial evidence in numerous ways. . . . So, too, a witness' self-contradictions or a party-opponent's admissions are receivable to discredit him, irrespective of their truth."

admissions, as for circumstantial utterances generally, is the relation between the utterance and the other relevant conduct of the speaker.

Wigmore aptly points this out when he compares in significance the circumstance of the inconsistency between the prior statement and the contention of the party by pleading, and the circumstance of the inconsistency between the testimonial statement of a witness in court and his prior statement out of court. In either event it is the inconsistency between the former statement and the present contention or statement which justifies the admissibility of the former statement as a circumstantial utterance which comes in regardless of its trustworthiness. The principal justification for placing admissions under hearsay rule inapplicable is that there is no concern for their trustworthiness. This is the distinguishing feature of all hearsay rule inapplicable. Just as a prior inconsistent statement of a witness is admissible without reference to whether it is the present or the previous statement which is false, so it is that the admission comes in equally soon whether it, standing alone, be true or false.

The probative force of circumstantial utterances generally arises from the fact that their existence is inconsistent with the validity of the contention of the party against whom they are offered. Thus when a mother-in-law who is being sued for alienation of affections offers proof that she advised her son to return to his wife, she is showing a circumstance which is inconsistent with the plaintiff wife's contentions that the mother-in-law both bore malice toward her and did alienate the son's affections. So it is that the unfavorable verbal conduct of a party litigant may be offered against him because of the circumstance of its inconsistency with the validity of his present contention by pleading. The circumstance of the party's statement being at variance with his present contention by pleading is such a cogent one that it may be considered by a jury, even to the extent of giving it the same weight as if the facts apparently narrated in it (if it does also happen to have narrative content) were true. But whether it has narrative content is incidental. It gets into the case because it is the relevant conduct of the party and, for that reason, is not subject to the application of the hearsay rule, which is applicable only to statements whose sole justification is as narrative. It is now proposed to point out the error of the contrary views concerning the usability of admissions which hold that they are to be explained as narrative and not as conduct.

The first of these is the theory of admissions as used under a genuine exception to the hearsay rule. If we assume that admissions are used on some narrative basis, it is proposed first to dispose of what seems to the writer to be the most obnoxious theory based on that idea. This is that of a genuine hearsay exception⁵⁰ for the express admission. Such a theory

50. See *supra* note 24, 85 U. OF PA. L. REV. at 502, for a definition of a "genuine hearsay exception".

lacks a serious defender at the present time, since Professor Morgan has apparently abandoned his original view (expressed in his first article on the subject) that admissions are used under an exception to the hearsay rule in favor of the later view that they are used as a species of "hearsay rule waived".⁵¹ For purposes of complete treatment, however, it is proposed now to dispose of that particular approach.

If express admissions are used under a genuine exception to the hearsay rule, it would be because there exists for them a "necessity" and a "cir-

51. As indicating Professor Morgan's abandonment of the genuine exception theory, consider the following extracts from an article published eight years after the one in which he advanced the genuine exception theory of admissions: "A litigant can scarcely complain if the court refuses to take seriously his allegations that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself . . ." Morgan, *supra* note 38, at 461. ". . . chief reason for receiving personal [express?] admissions. They are received not because they carry indicia of credibility. True, they very often are against interest; but whether dis-serving or self-serving they are admitted primarily because a party cannot object that he was not himself under oath or subject to cross-examination by himself . . ." *Id.* at 470. Furthermore, in the article just quoted from, Professor Morgan was arguing for a genuine exception for the vicarious admission, and (at pages 461-462) clearly points out that he considers that the express and vicarious admissions must be rationalized on entirely separate bases. All these things would seem to indicate that, in the interim, Professor Morgan had abandoned the genuine exception theory of express admissions for the hearsay rule waived one. For that matter, in his first article on the express admission Professor Morgan hinted at the hearsay rule waived theory: ". . . the admission is always offered against the declarant, and he cannot object to its being received as prima facie trustworthy, particularly when he is given every opportunity to qualify and explain it." Morgan, *supra* note 42, at 361. Another peculiar circumstance is that in his later article on vicarious admissions, Professor Morgan fails to mention or cite his former one advancing the genuine exception theory for express admissions. This is either excessively modest or extremely puzzling, unless Professor Morgan had changed his views in the meanwhile.

Despite its creator's abandonment of it, the genuine exception theory dies hard. Professor Ray, in reviewing WIGMORE, *STUDENT'S TEXTBOOK ON EVIDENCE* (1935), criticises Dean Wigmore and finds his theory of admissions "still unsatisfactory" because "he continues in his refusal to regard them as an exception to the hearsay rule". Ray, *Book Review* (1936) 14 *TEX. L. REV.* 285. It must be taken that the reviewer had in mind Professor Morgan's first article on express admissions because, while he does not refer to it, yet he does refer to Professor Morgan's article on vicarious admissions in the course of a similar criticism of Dean Wigmore for not following the Morgan theory of the vicarious admission.

The influence of Professor Morgan's first article on the express admission was widespread. Witness Dean Wigmore's temporary change of position, mentioned *supra* note 46. It would indeed be interesting if one could interpret the sequence to be that Dean Wigmore changed his position in the light of Professor Morgan's first article and that Professor Morgan made a further change in the light of Dean Wigmore's thesis in the second edition of his treatise. Truly a commendable interchange of scholarly courtesy, marred only by the fact that Dean Wigmore has apparently now backslid to practically his original position.

The late Professor Hinton was apparently mildly influenced by Professor Morgan's first article: "Admissions seem to be true exceptions to the hearsay rule [citing Professor Morgan's first article thereon], but their general admissibility is so universally recognized that no question of the hearsay rule is ever raised." Hinton, *Post-testamentary Statements to Prove a Lost Will Unrevoked* (1927) 21 *ILL. L. REV.* 821, at 828, n. 18.

Professor Whittier must also still have been under the influence of Professor Morgan's first article on admissions when, as late as 1933, in reviewing the third edition of WIGMORE, *CASES ON EVIDENCE* (1932), he said, anent the stand taken therein on admissions: "Incidentally, is it not a wee bit stubborn to insist that admissions and confessions are not exceptions to the hearsay rule?" Whittier, *Book Review* (1933) 27 *ILL. L. REV.* 586, at 587. But then, on the same page, Professor Whittier makes a charmingly inconsistent statement furnishing the best of arguments for the circumstantial utterance theory of admissions: "There is a growing realization that conduct of an individual differs from his hearsay statements, that conduct is generally admissible while hearsay is not."

cumstantial guarantee". For admissions there is no necessity of any sort recognized for the usual genuine exceptions. There is neither inconvenience nor impossibility of producing the original declarant, as the rule for admissions is stated. Nor is there any discernible relative superiority of the extra-judicial utterance over normal testimony on the witness stand.⁵²

So it is that, with respect to the "circumstantial guarantee" or "intrinsic superiority", there is nothing about admissions to justify their inclusion in the calendar of genuine exceptions. Superiority of perception is indicated only to the extent to which one knows his own affairs better than other things. Error in recollection is normal, as is the danger of erroneous narration. As the admission need not be against interest when made, there is no variation from normal in the motive to falsify. There is certainly no positive stimulus to trustworthiness. Further, the utterance is not admissible in any save the admitter's case, and then only against him, while the content of the genuine exceptions will come in in all appropriate cases and for either side.⁵³ The other rules of evidence are not applied to admissions as they are to the usual content of the genuine exceptions. There is no particular superiority with respect to the reproduction of the admission in the courtroom. The express admission has nothing in common with the genuine hearsay exceptions and totally lacks the identifying features found in all of them. If admissions are to be rationalized solely on a narrative basis, it must be by some other theory than that of a genuine hearsay exception.

Before treating of the other possible specific theories which might justify admissions as narrative, it seems timely to consider generally whether it is necessary to rationalize admissions as narrative at all, either under a genuine exception or as hearsay rule satisfied or waived. The writer does not deny that some express admissions and some of the other types may actually possess a narrative effect which the jury will attach to them. Rather,

52. In his first article, advocating the genuine exception theory of express admissions, Professor Morgan lamely attempted to find a "necessity" for using the admission, so as to fit it into the usual mould of genuine exceptions. Morgan, *supra* note 42, at 360-361. He compared the admission in this respect with statements of physical and mental condition and with spontaneous exclamations, i. e., those where, though it would be possible and convenient to produce the declarant, yet because of the superiority of the extra-judicial narration it is permitted to use the latter. But it would seem that the admission is not entitled thus to be classified in order to work a "necessity" for using it in order to have it qualify as a genuine exception. Statements of physical and mental condition and spontaneous exclamations possess an intrinsic superiority, due to the contemporaneity of their utterance and the likelihood of accurate perception and narration, which the typical admission cannot claim. Admissions do not necessarily concern facts certainly within the perception of the speaker, briefly and vividly remembered, and simply narrated.

53. The limitation of the use of dying declarations to criminal homicide cases concerning the death of the declarant must be understood not so much as restricting the type of litigation in which items under this exception may be used, but rather as an incidental restriction recognizing the only situations wherein dying declarations possess sufficient intrinsic superiority to meet the test of the hearsay exceptions, viz., where the fact narrated is one likely to be well perceived, vividly remembered and simply narrated.

he contends that all admissions may be rationalized on the single basis of their being conduct to which the hearsay rule is inapplicable and that it is unnecessary to consider the possible narrative effect which some of them may have. Other types of circumstantial utterances are permitted to be proven on that basis even though they also possess narrative significance. Prior inconsistent statements are, by the rule therefor, limited to those which state facts relevant in the case, and yet are permitted despite the hearsay rule because of their circumstantial value on the issue of credibility. Statements going to prove constructive notice to a property owner of the dangerous condition of his premises usually also narrate something about the negligent condition itself.⁵⁴ In such instances the statement is admitted circumstantially, with a warning to the fact finder to ignore the narrative content thereof. Such a warning would be given for admissions were it not for the fact that any possible narrative effect which might be attached to them is ipso facto the same as the circumstantial effect to be given them as conduct. It is the circumstantial value which enables all admissions to circumvent the hearsay rule. The incidental narrative value for some may be attached if the jury wishes because it reaches the same end as the circumstantial effect. It is customary to rationalize statements as narrative, i. e., as under either hearsay rule partially satisfied or the genuine exceptions, when the only bearing the statement has on the case is as narrative. If the statement can be rationalized both as conduct and as narrative, the latter significance is ignored and it circumvents the rule as conduct. The hearsay rule applies to those statements for which the only justification is their narrative content. It is inapplicable to those which are conduct, i. e., for which the trustworthiness of the utterance is a matter of indifference. So it is with admissions. The writer feels that inasmuch as all admissions, express and otherwise, can be rationalized as the relevant conduct of the speaker, it is unnecessary to predicate their admissibility on the basis of a possible narrative effect not possessed by all of them.

Further, the narrative theory of admissions leads to analytical difficulties when it is sought to discover their specific relation to the hearsay rule in terms of their being narrative. It has already been pointed out that they are incapable of being classified with the genuine exceptions to the hearsay rule. Of the traditional hearsay rule headings there is left only that of hearsay rule satisfied. It was to this heading that Wigmore turned in taking the stand in the second edition of his treatise which he has since apparently repudiated.⁵⁵ At that time, under the influence of Professor Morgan's first article on the topic, Dean Wigmore was willing to concede a

54. In *Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. 212 (1890), such a problem was presented.

55. 2 WIGMORE, *op. cit. supra* note 41, § 1048.

narrative theory of admissions, but not one for a genuine exception. Predicating that the hearsay rule was based on a need for all testimony to be given the opportunity to be cross-examined, he concluded that when a party's own statements are offered against him the reason for the rule ceases, because a party does not need the opportunity to cross-examine himself. Hence the rule is satisfied as much as in a case of testimony formerly given under an actual opportunity to be cross-examined in the normal manner.

To fit such a theory into the present analysis and its heading of hearsay rule partially satisfied would require a third sub-heading thereunder, in addition to those for former testimony and past recollection recorded, i. e., for narration not in need of being conditioned because made by the very party who is entitled to demand the application of the conditioning devices to his opponent's offered testimony. But the concept of the party's "cross-examining" himself, or applying the conditioning devices to himself, seems an awkward one.⁵⁶

Rather than as a theory of hearsay rule satisfied it would seem that a *more* plausible narrative theory of admissions is that apparently now held by Professor Morgan, i. e., hearsay rule waived because the only one to object is the one who spoke the utterance offered. This hearsay rule waived theory would have to be a fourth general heading of the whole topic of the hearsay rule, or it might be classified as a second and dissimilar type of hearsay rule inapplicable, which would leave that heading as covering (a) hearsay rule inapplicable to statements offered as non-narrative conduct, and (b) hearsay rule inapplicable to narrative statements offered against one who, being himself the narrator, is estopped to object or has waived the application of the conditioning devices at the time of narration.⁵⁷

Even aside from the lack of necessity of any narrative theory of admissions, it seems that to have to fall back on waiver or estoppel is very

56. Professor Ray, in the book review cited *supra* note 51, at 288, refers to the theory of the party cross-examining himself as "quibbling". But does Dean Wigmore's *STUDENT'S TEXTBOOK ON EVIDENCE*, there under review, repeat the theory of the party cross-examining himself? The portion referred to in Professor Ray's review, i. e., § 180 (c), merely says, "the reason for the rule here ceases," without anything about the party's self cross-examination. Perhaps Professor Ray had in mind the further statement to that effect in the second edition of Dean Wigmore's treatise. But the present writer believes, as pointed out *supra* note 48, that in the meantime Dean Wigmore has abandoned the hearsay rule waived theory for a retrogression to the impeachment theory.

57. See *supra* note 21, 85 U. OF PA. L. REV. at 499-500, concerning the idea that the most plausible narrative theory of admissions is that they are trustworthy under the suggested extended doctrine of hearsay rule partially satisfied, because the narrator can be subjected to the conditioning devices in the courtroom concerning his prior narration. Thus, by analogy to past recollection recorded, the narration becomes *ex post facto* trustworthy because of the possibility of subsequently conditioning the narrator. Aside from the question of *ex post facto* conditioning of the narration, another narrative theory might be that admissions have an *ex post facto* trustworthiness because the speaker can, if he wishes, contradict them at the trial, failing which they must be true. This would put the express admission on a plane with the tacit or adoptive admission, and make the failure to deny at the trial equivalent to the failure to deny at the time the statement is addressed to the party. All of these theories lose sight of the vicarious admission for which it is impossible for the speaker subsequently to deny or affirm, as the rules apply.

weak analysis. To do so would require encumbering the analysis of the hearsay rule generally with a fourth concept, or with a second and totally dissimilar half to the first of the three general concepts now recognized. And this encumbering of the hearsay analysis with an otherwise unnecessary and analytically weak concept provides only for express admissions.

The writer fails to see wherein the "hearsay rule inapplicable" or "circumstantial utterance" or "relevant conduct" theory of express admissions is invalid. This theory seems to afford an appropriate avenue for getting all admissions, express and otherwise, around the hearsay rule. Express admissions meet the test for circumstantial utterances generally, as they are worked out on a basis of those utterances about which there is no question of classification.

Professor Morgan has attempted to demolish the "relevant conduct" theory of admissions by putting it in its most unfavorable light, that of the double inference, and then by saying of it scornfully: "Imagine attempting to expound it to the average jury!"⁵⁸ The first answer is that we do not attempt to expound it or any other theoretical approach to any jury. We do not attempt to expound the principles of architecture to bricklayers, nor those of engineering to riveters. But architects and engineers profit by such pure theory just as judges, lawyers, teachers, and students profit by considering the correct theoretical explanation of why and how evidence is used.

The double inference theory of admissions as circumstantial utterances is that the fact of the utterance furnishes a basis for an inference as to the state of mind of the admitter, which in turn affords an inference to the facts producing that state of mind.⁵⁹ But do we consciously have to go to this extreme to rationalize the admission as conduct? Would the average jury do so if they could? Does not the average jury view the fact of the inconsistency between the present stand of the party in the case and the tenor of his previous remarks, and attach whatever circumstantial effect they wish to the latter? Is not the mental process of the average jury in weighing an admission similar to that of their judging of the inconsistency between a testimonial statement in court and a prior inconsistent statement out of court? If the circumstance of the inconsistency between two statements can throw light on the credibility of an impeached witness, why cannot also the circumstance of the inconsistency between an informal statement

58. Morgan, *supra* note 42, at 356-357. See *infra* note 60.

59. Professor Morgan himself, in a later article, deals with an analogous proposition wherein the "double inference" is involved: "It therefore seems clear that where evidence of A's conduct is offered as tending to prove the happening of an event or the existence of a condition by the process of inference from that conduct to A's state of mind and from A's state of mind to the event or condition, the dangers inherent in hearsay manifest themselves in no mean measure." Morgan, *Hearsay and Non-Hearsay* (1935) 48 HARV. L. REV. 1138, at 1143.

out of court and a formal statement by pleading in court throw light on the validity of the latter, which is the issue on trial?

Finally, let it be remembered that the belittled "double inference" theory is the avenue by which all circumstantial utterances have probative force. An example or two will suffice: A person whose sanity is in question is shown to have shouted, "I am Napoleon!" The fact of his stating this permits an inference that he believed himself to be Napoleon. The fact of his having such a belief permits an inference that he must be mentally unbalanced. A bystander to a fatal scuffle in a case where the defendant pleads self-defense testifies that the victim said to the defendant, "I shall cut your heart out." The fact of the victim's speaking such words in the defendant's presence allows the inference that the defendant heard them. The fact that defendant heard such words allows the inference that he believed his life to be in danger. This fact is operative under the self-defense plea. Thus it is that to attack the circumstantial utterance theory of admissions by being scornful of the "double inference" is to attack the general concept of the circumstantial utterance. If such things as circumstantial utterances exist, admissions belong with them.

The writer feels that Dean Wigmore's latest view is the correct one, viz., that an admission is a circumstantial utterance which impeaches the case of the party as fixed by the pleadings, and, therefore the circumstance of the inconsistency has probative force on such issues. It is not necessary consciously to adopt the device of the double inference to rationalize the use of express admissions as relevant conduct. But even if this be so, it is no more involved than the narrative theory for implied admissions. To rationalize all admissions as narrative requires that implied admissions be considered as conduct equalling a statement to the effect that the actor's case is unfavorable, which in turn will come in as narrative. The average jury does not think of unfavorable non-verbal conduct in such terms, but rather attaches to it whatever significance as conduct it deserves. So it would seem that they attach to verbal conduct of parties whatever significance such conduct, in the light of experience, deserves. Imagine attempting to expound the hearsay rule waived theory (or any other typical theoretical approach to any evidential principle) to the average jury.⁶⁰

Vicarious admissions

The principle of vicarious admissions permits offering in evidence against a party any statement by another who bears a relevant relation to the party, where the statement is made concerning the content of the relation. Thus it is that under proper detailed circumstances statements of the agent

60. Consider the feasibility of expounding to the average jury Professor Morgan's latest article on hearsay. Morgan, *supra* note 59.

concerning the agency may be offered against the principal, statements of one co-conspirator may be offered against another, statements of a predecessor in title may be offered against a successor, and statements of the insured may be offered against the beneficiary.⁶¹ Of these four typical examples, while all are to be classed as coming under hearsay rule inapplicable to conduct, the former two are specifically examples of utterances forming a part of relevant conduct, while the latter two are examples of utterances which are themselves relevant circumstantial conduct.

The present writer feels that vicarious admissions, as all species of admissions, are to be explained in their relation to the hearsay rule not as narrative but as conduct, and that the justification for their use is under the general heading of hearsay rule inapplicable to utterances which are offered for some other purpose than to prove the truth of their content. The true principle for vicarious admissions would seem to be that the relevant conduct of those bearing a presently relevant relation to a party may be offered against him. Thus the vicarious admission, regardless of whether it does have narrative content, will get by the hearsay rule as the conduct of one whose conduct is, by virtue of the relation, relevant in the case.

The use of these admissions expressly authorized to be made for one, or subsequently adopted, is on a different plane from the use of statements incidental to a relevant relation. A statement which a party expressly authorizes another to make for him or which he later expressly adopts comes under the same principle as does the express admission, viz., as the statement of the party himself. Whether the party chooses to use voice, pen, pencil, typewriter, printing, or the voice or hand of another as the vehicle of *his* utterance is immaterial, for it will come in equally in all events as *his* utterance. But an entirely different matter is the use against a party of a statement by another which was neither authorized nor expressly adopted but which was merely incidental to an otherwise existent relation between the speaker and the party. For the latter there arises again the problem of whether the explanation of the relation to the hearsay rule is in terms of conduct or narrative.

If the explanation be that such statements are used as narrative, then it remains that an entirely different sub-theory must be found other than that which is relied on by the adherents of the narrative theory for the express admission, i. e., that of hearsay rule waived. For even Professor Morgan, apparently an adherent of the waiver theory for express admis-

61. These four types of vicarious admission have been chosen as the most typical for purposes of the present discussion. There are numerous others to be observed in any standard digest or treatise on evidence. For an exhaustive survey of a larger group of vicarious admissions see Morgan, *supra* note 38. Professor Morgan treats the following additional types: declarations of the principal against the surety, joint obligors, joint owners, statements of a deceased person against the administrator or next of kin, and statements of a bankrupt against the trustee.

sions, admits that it cannot extend to vicarious admissions. He observes that while it might be said that one cannot object that he himself was not under oath or cross-examination when he spoke, yet he is entitled to the benefits of the ordinary safeguards against hearsay when someone else's statement is offered against him.⁶² Thus if we are to rationalize the vicarious admission on a narrative basis, it must either be by virtue of some genuine exception to the hearsay rule or under some principle of hearsay rule partially satisfied. The latter proposition is entirely out of the picture for, as the rules apply, none of the conditioning devices is ever necessarily applied to the speaker.

This leaves the calendar of genuine hearsay exceptions to explain the vicarious admission if it is to be rationalized on any narrative basis. It was to this group that Professor Morgan turned in attempting to explain the use of vicarious admissions as narrative.⁶³ In doing this, however, he set out more to concern himself with the law-that-ought-to-be than with the law-that-is. First he concluded that the courts (and other writers) have been permitting far too many statements to be offered as vicarious admissions. Then he decided that the limitations on the genuine hearsay exception for declarations against interest (i.e., that the declarant be unavailable and that the statement be against pecuniary or proprietary interest) were of illegitimate origin and should be dispensed with. As a result of this contraction of the field of vicarious admissions and expansion of the boundaries of declarations against interest, he was able to conclude that they coincide and that the true rationale of vicarious admissions is that they come in under the genuine hearsay exception for declarations against interest. This semi-Procrustean⁶⁴ feat shows the limits to which one must go to rationalize admissions as narrative. Perhaps Professor Morgan's dissatisfaction with the law-that-is of vicarious admissions demonstrates the pitfalls attendant upon too much emphasis on the narrative aspect of admissions and the incidental ignoring of the conduct aspect thereof. For as the law is, courts permit statements to come in under the principle of vicarious admissions which were not, when spoken, against the interest of the speaker and which did not then possess any discernible intrinsic superiority as narrative.

Many of the same things could be said of the narrative theory of vicarious admissions as were said previously concerning the same theory of express admissions. Particularly should the point be repeated that

62. Morgan, *supra* note 38, at 461-462.

63. *Ibid.*

64. The prefix "semi-" is used advisedly. The original Procrustes always altered the size of the traveler to fit the constant sized bed. Professor Morgan's accomplishment is analogous to chopping a little off the traveler and enlarging the bed also so that the former might fit the latter.

while the vicarious admission may have narrative content, yet it also has conduct significance which allows it to circumvent the hearsay rule. All that was said against the genuine hearsay exception theory for the express admission could be repeated here against a similar (and the only possible) narrative theory for the vicarious admission. There is no more "necessity" or "circumstantial guarantee" for vicarious admissions than for express ones. There is probably even less intrinsic superiority for the vicarious admission, as the rule applies. The other rules of evidence are not applied. Particularly there is no requirement that the speaker have any testimonial knowledge of what he is talking about, which is fundamentally necessary if the utterance be used as narration.

Were the only possible justification for the vicarious admission a narrative one and were it so that the law permits only those statements by other persons for which there is a "necessity" and a discernible intrinsic superiority to justify dispensing with the conditioning devices, then there would be force in the genuine exception theory of the vicarious admission. But, as the rules apply, there is a justification for the vicarious admission as relevant conduct. Furthermore, there is no discernible necessity and intrinsic superiority for it as narration.

For vicarious admissions by agents and co-conspirators the writer prefers the view that they are to be explained as utterances which are parts of relevant conduct to which the hearsay rule is, therefore, inapplicable. This is a plausible explanation, as the rules for these types apply.

The courts generally require for the use of a vicarious admission by a party's agent that the statement be made by the agent while he is engaged in some relevant act within the scope of the agency and that it be concerning the act he is then doing. Is not this an excellent example of a declaration accompanying a relevant act? The verbal conduct of the agent is relevant in the case by virtue of its relation to the independently relevant contemporaneous non-verbal conduct of the speaker. If the agent's non-verbal conduct is relevant, why not his contemporaneous verbal conduct which explains it?

The use of vicarious admissions by co-conspirators is usually limited to those statements which are made in furtherance of the conspiracy. Here again we see a species of declaration accompanying a relevant act, viz., some part of the conduct of the conspiracy. Were the true explanation a narrative theory, would it not be so that all statements of the conspirators would be equally intrinsically superior, whether made in furtherance of the conspiracy or not? How can the fact of the contemporaneous furtherance of the conspiracy improve the trustworthiness of the utterance if that be the rationale? The answer is that the total conduct of the conspirators

in furtherance of the conspiracy, verbal and otherwise, is relevant circumstantially and regardless of its trustworthiness.

Two other typical vicarious admissions are to be explained as themselves relevant circumstantial conduct, i. e., circumstantial utterances. These are declarations of a predecessor in title when used against his successor and statements of the insured when used against the beneficiary on a life policy. In a way both might also be explained as declarations accompanying a relevant act, viz., accompanying the relevant courses of conduct of being the former owner of the property, or of being the insured person under the policy. But if this is too far fetched, a more plausible explanation remains in terms of circumstantial utterances.

In the former situation it can be said that the verbal conduct of an alleged former owner in denying or belittling his title is a relevant circumstance in the present case when the party claims title through him. If the party offers to show his title by virtue of the non-verbal conduct of the former owner in owning, why cannot the adverse party similarly show the separate verbal conduct of the same person in denying or belittling his title? Is not one as relevant a circumstance as the other? Both are themselves the relevant conduct of one whose conduct is relevant in the instant case.

So it is with the rule that the declarations of the insured may be offered against the beneficiary where the insured had the right to change the beneficiary on the policy, but not otherwise. This situation forces us to visualize the two types of life insurance policy. One is that taken out by the insured on his own life, with the proceeds to go to the beneficiary as a matter of gratuity, and for which the insured reserves the right to change the beneficiary because he is the essential contracting party. The other type is that where the beneficiary takes out the policy on the life of the insured to protect some interest of his own and he (the beneficiary) pays the premiums and the insured has no right to change the beneficiary. In the former case the conduct of the insured, verbal and otherwise, is relevant because he is the person who made the contract. In the latter case the conduct of the insured is immaterial because the contract is between the beneficiary and the company. The insured's conduct loses significance as he was not a party to the contract. Where the beneficiary is the recipient of a gratuity, he gets it because of the conduct of the insured and hence all the conduct of the insured is relevant. In the other type of policy none of the conduct of the insured has any relevance. So it is that the distinction is made in terms of the relevancy of the conduct, as it should be, and not in terms of any difference in the trustworthiness of the utterances respectively. There is no such difference.

Thus it is that the present writer feels that the true explanation of vicarious admissions is not in terms of their trustworthiness as narrative,

but rather in terms of their relevancy as the circumstantial conduct of persons whose conduct acquires relevance by virtue of the relation between the speaker and the party against whom the statement is offered.

Tacit admissions

The doctrine of tacit admissions permits offering against a party the accusatory statements of another made in the presence of the party or addressed to him under circumstances making it natural for him to reply. Some jurisdictions extend the doctrine so far as to permit the proof of anything said by anyone in the presence of the opposite party.⁶⁵

It seems to the present writer that the use of such admissions by silence gets around the hearsay rule on the basis of that rule's being inapplicable to circumstantial utterances. We have seen that utterances which are themselves relevant circumstantial conduct have relevance in the case either for what they prove concerning the non-contemporaneous conduct of the speaker or for what they prove concerning the conduct of the hearer. It has been remarked that express admissions fall in the former class. Tacit admissions seem to fall in the latter class and have probative force in the case because of the significance they have concerning the conduct of the one who hears their utterance.

For when a statement of another in the presence of a party is used against the latter, the reason for it is the juxtaposition of the verbal conduct of the speaker and the non-verbal conduct of the party. It is the circumstance of not making a denial when it is natural to do so that proves something concerning the case of the one who failed to do the natural thing. The conduct of the hearer in not responding to that of the speaker is, in human experience, a cogent circumstance.

As with all types of admissions, there is the controversy between the conduct theory and the narrative theory concerning the relation between the admission and the hearsay rule. It is hard to discern any plausible genuine hearsay exception theory for the tacit admission, because it is impossible to find any intrinsic superiority in the utterance sufficient to justify dispensing with the conditioning devices applicable to narrative statements or any necessity for using it in preference to calling the speaker as a witness in the regular manner.

A possible narrative theory does suggest itself, specious though it be: that the party, by not dissenting at the time the statement is made to him, avers his satisfaction with it. This would be by way of analogy to the act of a party's counsel in court in waiving cross-examination. But does the actual waiver of cross-examination admit the truth of everything said on direct examination? If failure to dissent is equivalent to waiver of cross-examination, does it also waive the application of the other equally important

65. 2 WIGMORE, *op. cit. supra* note 41, § 1071.

conditioning devices? It would be even more specious to say that hearing an accusatory statement makes one at his peril choose between dissent and waiver of all the conditioning devices which the law of evidence has worked out to guard against the native untrustworthiness of human testimony.

A little more plausible is the fiction that the party's failure to dissent amounts in law to his expressly stating the things included in the accusatory statement made to him.⁶⁶ Were this so, then we would have nothing but an express admission by the party himself to open again the whole problem of the rationale of express admissions. But even this less specious bit of legal acrobatics seems unnecessary to explain the relation of tacit admissions to the hearsay rule when the simple one of relevant conduct is available.

The tacit admission seems a most excellent example of the circumstantial utterance, particularly of the type where the utterance has relevance because of the light it throws on the conduct of one who has heard it spoken and who acts in a certain manner thereafter. Just as where, upon the defendant's hearing a threat uttered against his life, he may contend that he acted on a reasonable belief of the need for self defense, so a party's hearing an accusation which he fails to deny circumstantially shows that he must be guilty of that which is involved in the accusation. We are not particularly concerned with whether the statement of the speaker is true or false, or with his testimonial qualifications. On the other hand, be it true or false, did the speaker know or not, the fact of the party's failing to respond to it under circumstances when it would have been natural for him to do so is circumstantial on the question of his guilt.

Implied admissions

The last type of admission is that implied from conduct, either from non-verbal conduct or from verbal conduct not expressly stating the inference sought to be drawn from it by the offering side. Thus it is that the fabrication, spoliation or suppression of evidence, the bribery of a witness, and the flight of one suspected of crime will all come in as an implied admission by the actor of the weakness of his cause. Offers to compromise, the carrying of insurance against liability, and the taking of subsequent safety precautions after an accident would also be implied admissions of fault save that they are excluded by other rules concerned with evidential policies other than that of trustworthiness.⁶⁷

It would seem that if ever the relevant conduct theory of admissions would apply it would be to the admission implied from conduct. And the writer believes that the classification of the implied admission with the

66. On this see *id.* § 1052.

67. I. e., the rule against compromise offers seeks to serve the extrinsic policy of encouraging the compromising of litigation, and the other two rules seek to avoid the jury confusion which would arise if evidence of such prejudicial effect were permitted to be heard.

verbal admissions goes to show that the true theory of all of them is that they are the relevant conduct of the speaker, so that if he be the party they will come in as his relevant conduct or if he be the one in a relevant relation to a party they will come in as relevant to the case of the party by virtue of the relation.

But the adherents of the narrative theory can, by a convenient fiction, attempt to extend it to the implied admissions as well. This is by translating the non-verbal conduct of the party into a statement by him that his cause is weak, which thereupon amounts to an express admission. Thus all the ramifications of the narrative theory of express admissions are raised again. To be sure, this process of translating conduct into narration is as involved as is the "double inference" process that makes Professor Morgan so wary of the conduct theory of express admissions.⁶⁸ If the conduct theory makes it (allegedly) necessary to translate statement into conduct via belief, is it not equally true that here the narrative theory makes it always necessary to translate conduct into the narration of the party-actor? Is not the relevant conduct theory the simpler, after all? The implied admission from conduct can be explained for what it instantly appears to be, viz., the unfavorable conduct of a party litigant which circumstantially shows the weakness of his cause, whether it shows it via his belief, or as such and without the trouble of delving into his subjective belief for its own significance.

CONCLUSION

The principal argument for the hearsay rule inapplicable or circumstantial utterance or relevant conduct theory of admissions is that it affords a single and simple explanation for all four types of admissions, whereas the narrative theory involves four different and analytically awkward explanations for the respective types. Under the relevant conduct theory all admissions are simply to be explained as the relevant unfavorable conduct either of the party himself or of someone bearing such a relation to the party as to make his conduct concerning the relation equally relevant in the party's case. On the other hand, under the narrative theory we must explain express admissions in terms of hearsay rule waived; the vicarious admission calls into play the dubious maneuvers essential to bring it under a genuine hearsay exception; the tacit admission involves the fiction of implied statement by failure to dissent from the utterance of another; and the implied admission makes necessary the translation of a party's own conduct into his statement. After all these involved acrobatics we end up with an addi-

68. See *supra* note 5, 85 U. OF PA. L. REV. at 488, for a discussion of the problem of *Wright v. Tatham*, 5 A. & F. 670 (1838), in which case an equally involved translation of conduct into narration was used to exclude the conduct from evidence. See also Morgan, *supra* note 59.

tional concept (hearsay rule waived) for three types and either a sadly altered genuine exception or an entirely new one for the vicarious admission. The relevant conduct theory puts all admissions under a concept already established for the hearsay rule—hearsay rule inapplicable—and thus affords an explanation which reduces the size of the hearsay analysis. Why ignore an applicable and already established concept which fits without trouble in favor of additional ones having no other significance and making necessary some awkward analytical steps?

A much quoted phrase from *State v. Willis*⁶⁹ seems aptly to express the relevant conduct or circumstantial utterance theory of admissions:

“They [admissions] are not admitted as testimony of the declarant in respect to any facts in issue; for that purpose they are open to the objections to hearsay evidence. They are admitted because conduct of a party to the proceeding, in respect to the matter in dispute, whether by acts, speech or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue.”

With the slight variation necessary to incorporate the vicarious admission this serves to express the “hearsay rule inapplicable” theory of admissions. Whether they have narrative significance is immaterial. They come in because the hearsay rule is inapplicable to them, inasmuch as they have significance in the case regardless of their trustworthiness. The hearsay rule is applicable only to those statements for which the sole excuse is as narration and for which there is a problem of trustworthiness. Admissions come in under a general principle for the unfavorable conduct of parties litigant or of persons in relevant relations to parties litigant.

The problem suggests itself that if admissions are to be rationalized as the relevant conduct of parties, why should not the favorable conduct as well as the unfavorable be permitted in evidence? Why not, therefore, allow a party to offer his own statements? But there is ample justification for the rejection of self-serving statements and of other favorable conduct as circumstantial proof to support the party's own case while unfavorable statements and other conduct are permitted against him. In the law of evidence generally, inconsistent or abnormal happenings are accorded more weight as circumstantial evidence than are consistent or normal events. So it is with the circumstantial conduct of the party himself; his unfavorable conduct, verbal and otherwise, is admitted; his favorable conduct is denied admission for circumstantial purposes. Two analogies to other rules of evidence can be used to support the law's rejection of favorable circumstantial conduct of parties litigant.

69. 71 Conn. 293, 306, 41 Atl. 820, 823-824 (1898).

One analogy is to the closely connected rule for prior inconsistent statements to impeach. The opponent may impeach a witness by showing his prior inconsistent statements. The proponent is not permitted to sustain by proof of prior consistent ones. The circumstance of conflict in narrative utterances is thought probative on the issue of the witness's credibility, while the circumstance of consistency is denied probative force either on the issue of his general credibility or that of the accuracy of his specific statement in court. On this point we see the acceptance of the inconsistent similar conduct and the rejection of the consistent. So it is that the rule for admissions rejects consistent conduct of a party litigant and accepts his inconsistent conduct.

The other analogy is to the rule for showing similar instances of negligence. That a few other persons were injured at the same spot is admissible to prove the negligent character of the maintenance of an obstruction,⁷⁰ but that thousands passed the same spot without being injured is not admissible to show that it was maintained in a non-negligent manner.⁷¹ Again, the abnormal is seen to be far more probative than the normal, the inconsistent more so than the consistent. Thus it would seem perfectly plausible to state a "relevant conduct" theory of admissions which accepts only the unfavorable relevant conduct of parties litigant and rejects the favorable conduct. Such a step has ample precedent in other rules dealing with circumstantial evidence.

All things considered, the writer feels that the most available rationale of admissions is not to be made on the basis of their narrative significance, but rather lies in terms of hearsay rule inapplicable to extra-judicial statements which are offered not to prove the truth of their content alone, but as the non-narrative conduct of persons whose conduct is circumstantially relevant in the instant case. The hearsay rule does apply to those extra-judicial statements which can be rationalized only as narrative and for which trustworthiness is a problem. But for the various types of admissions the trustworthiness of the utterance is a matter of indifference. Thus the hearsay rule is inapplicable to them.

70. *District of Columbia v. Armes*, 107 U. S. 519 (1882).

71. *Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260 (1869).